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# Public Prosecutor v Nguyen Hang Nga

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05(SH)-250–09 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
24 OCTOBER 2016

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*Criminal Law — Dangerous drugs — Trafficking — Respondent charged with offence of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act — Trial court found prosecution only proved case of possession under s 12(2) of the Act — Respondent convicted for offence of* D *possession and sentenced to 18 years imprisonment — Prosecution appealed against decision — Whether respondent's conduct showed that she had no knowledge of drugs — Whether there were contradictions in defence case — Whether respondent rebutted presumption of trafficking under s 37(da) of the Act — Dangerous Drugs Act 1952 ss 12(2), 37(da), 39A(2), 39B(1)(a) & (2)*

E

The respondent was originally charged with the offence of trafficking in dangerous drugs ie methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. The prosecution case was that, upon inspection of the respondent's bag ('exh P6') at F the Sultan Ismail Petra Airport, the police officer ('SP8') found 54 pieces of lace material folded in hard paper. When the hard paper was cut, SP8 found a brown packet containing white substance which was later confirmed to be 3,128.80g of methamphetamine ('the said drugs'). The respondent's defence was that, the lace was given by her friends in India and she did not have any G knowledge of the drugs concealed in the said lace. At the end of the trial, the learned trial judge found that the respondent had rebutted the presumption of trafficking under s 37(da) of the Act. Based on the conduct of the respondent in remaining calm from the point she collected exh P6 until the time the bag was scanned and physically examined, the court accepted that the respondent H had no knowledge of the said drugs. The learned trial judge therefore ruled that the prosecution had only succeeded in proving a case for possession under s 12(2) of the Act, punishable under s 39A(2) of the Act. The respondent was accordingly convicted and sentenced to 18 years imprisonment. Dissatisfied with the decision, the prosecution filed the present appeal. The prosecution I submitted that the learned trial judge erred in relying on the conduct of the respondent to find that the respondent had no knowledge of the drugs. The prosecution also submitted that the evidence of the respondent was not credible in view of the inconsistencies between her caution statement ('exh D1') and her oral testimony. It was further submitted that the

respondent's version was not probable and that the respondent failed to take steps to inspect the bag. The respondent thus guilty of willful blindness and had failed to rebut the presumption of trafficking under s 37(da) of the Act.

**Held**, allowing the appeal, setting aside the order of the High Court and substituting it with an order of conviction under s 39B(1)(a) of the Act and sentencing the respondent to death under s 39B(2) of the same Act:

(1) The learned trial judge erred in relying on the respondent's calm conduct as conduct alone could not be the basis to find absence of knowledge. His Lordship ought to have considered the whole facts and circumstances of the case which he failed to do, in particular the learned trial judge failed to consider that the respondent had not been consistent in her version. On the facts, there were many discrepancies between the respondent's testimony and her cautioned statement. The learned trial judge failed to consider that the discrepancies or inconsistencies in the respondent's version affected the credibility of the defence. Thus, the learned trial judge erred in his conclusion that the respondent had rebutted the presumption of trafficking (see paras 24 & 29).

(2) The respondent's evidence on the events that led to her arrest was inherently improbable for the following reasons: (a) the respondent stated that she went to India for holiday but she mentioned nothing about the place she visited; (b) she said she stayed in a friend's house in India for eight days and she had visited Malaysia to meet a friend, yet she did not know the friends' name; (c) if she had been staying with a friend in India, there was no need to call and asked her friend in Kampuchean to call her friend in India to buy her return ticket; and (d) 54 pieces of lace was too large an amount to serve as a sample. The reasonable inference to be drawn from the facts and circumstances was that the respondent knew of the drugs concealed in the lace. The prosecution had therefore proved its case beyond reasonable doubt (see paras 30 & 32).

**[Bahasa Malaysia summary**

Responden pada asalnya dituduh dengan kesalahan mengedar dadah berbahaya iaitu methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39B(2) Akta tersebut. Kes pendakwaan adalah bahawa, setelah memeriksa beg responden ('eksh P6') di Lapangan Terbang Sultan Ismail Petra, pegawai polis ('SP8') menjumpai 54 keping bahan berenda yang terlipat dalam kertas keras. Apabila kertas keras itu dipotong, SP8 menjumpai satu bungkusan berwarna perang yang mengandungi bahan putih yang kemudian disahkan sebagai methamphetamine seberat 3,128.80g ('dadah tersebut'). Pembelaan responden adalah bahawa, renda itu telah diberikan oleh kawan-kawannya di India dan dia tidak mempunyai apa-apa pengetahuan tentang dadah tersebut yang tersembunyi dalam renda tersebut. Di akhir perbicaraan, hakim

perbicaraan yang bijaksana mendapati bahawa responden telah mematahkan andaian pengedaran di bawah s 37(da) Akta tersebut. Berdasarkan perlakuan responden yang kekal tenang dari masa dia mengutip eksh P6 sehingga masa beg tersebut diimbas dan diperiksa secara fizikal, mahkamah menerima bahawa responden tidak mempunyai pengetahuan tentang dadah tersebut. Hakim perbicaraan yang bijaksana dengan itu memutuskan bahawa pendakwaan hanya berjaya membuktikan kes untuk milikan di bawah s 12(2) Akta tersebut, yang boleh dihukum di bawah s 39A(2) Akta tersebut. Responden sewajarnya disabit dan dihukum penjara selama 18 tahun. Berasa tidak puas hati dengan keputusan itu, pendakwaan telah memfailkan rayuan ini. Pendakwaan berhujah bahawa hakim perbicaraan yang bijaksana terkhilaf kerana bergantung kepada perlakuan responden yang mendapati bahawa responden tidak mempunyai pengetahuan tentang dadah itu. Pendakwaan juga berhujah bahawa keterangan responden tidak boleh dipercayai berdasarkan kenyataan beramarannya ('eksh D1') dan keterangan lisannya yang tidak konsisten. Ia selanjutnya dihujahkan bahawa versi responden tidak berkemungkinan dan bahawa responden gagal untuk mengambil langkah-langkah untuk memeriksa beg itu. Responden dengan itu bersalah kerana sengaja tidak ambil peduli dan telah gagal mematahkan andaian pengedaran di bawah s 37(daa) Akta tersebut.

**Diputuskan**, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan menggantikannya dengan perintah sabitan di bawah s 39B(1)(a) Akta tersebut dan menjatuhkan hukuman mati ke atas responden di bawah s 39B(2) Akta yang sama:

(1) Hakim perbicaraan yang bijaksana terkhilaf tentang perlakuan tenang responden kerana perlakuan semata-mata tidak boleh menjadi asas mendapati ketiadaan pengetahuan. Yang Arif sepatutnya mempertimbangnkan keseluruhan fakta dan keadaan kes yang mana beliau telah gagal untuk berbuat sedemikian, khususnya hakim perbicaraan yang bijaksana telah gagal mempertibangkan bahawa responden tidak konsisten dalam versinya. Berdasarkan fakta, terdapat banyak percanggahan antara keterangan responden dan keterangan beramarannya. Hakim perbicaraan yang bijaksana telah gagal untuk mempertimbangkan bahawa pertikaian atau percanggahan dalam versi responden menjejaskan kebolehpercayaan pembelaan. Oleh itu, hakim perbicaraan yang bijaksana terkhilaf dalam kesimpulannya bahawa responden telah mematahkan andaian pengedaran (lihat perenggan 24 & 29).

(2) Keterangan responden berhubung kejadian yang membawa kepada tangkapannya memang tidak berkemungkinan kerana sebab-sebab berikut: (a) responden menyatakan bahawa dia telah pergi ke India untuk bercuti tetapi dia tidak menyebut apa-apa tentang tempat yang dilawatinya; (b) dia menyatakan yang dia tinggal di rumah seorang kawan di India selama lapan hari dan dia telah melawat Malaysia untuk

berjumpa seorang kawan, namun dia tidak memberitahu nama kawan itu; (c) jika dia tinggal bersama kawan di India, tiada keperluan untuk memanggil dan meminta kawannya di Kampuchea untuk memanggil kawannya di India membeli tiket pulangnya; dan (d) 54 keping renda adalah jumlah yang terlalu besar untuk dijadikan sebagai satu sampel. Inferens munasabah yang boleh dibuat daripada fakta dan keadaan adalah bahawa responden mengetahui tentang dadah yang disembunyikan dalam renda tersebut. Pendakwaan dengan itu telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 30 & 32).]

**Notes**

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

**Cases referred to**

*Francis Abuchi Odike v PP* [2015] MLJU 816; [2015] 1 LNS 928, CA (refd)
*Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489, CA (refd)
*Ibrahim Mohamad & Anor v PP* [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
*Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
*Teh Hock Leong v PP* [2010] 1 MLJ 741, FC (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 12(2), 37(da), 39A(2), 39B(1)(a), (2), First Schedule

**Appeal from**: Criminal Trial No 45A-6–4 of 2014 (High Court, Kota Bharu)

*Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*
*Lee Teong Hooi (Lee Tan & Assoc) for the respondent.*

**Tengku Maimun JCA (delivering judgment of the court):**

**[1]** This was the prosecution's appeal against conviction and sentence imposed by the High Court at Kota Bharu on the respondent under s 39A(2) of the Dangerous Drugs Act 1952 ('the Act').

BACKGROUND

**[2]** The respondent was originally charged for trafficking in dangerous drugs. The charge reads:

Bahawa kamu pada 8 November 2013 lebih kurang jam 12.25 tengahari, bertempat di Lapangan Terbang Sultan Ismail Petra, Pengkalan Chepa, dalam Daerah Kota Bahru, di dalam Negeri Kelantan telah mengedar dadah berbahaya iaitu 3,128.80

gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

**[3]** At the end of the prosecution's case, the learned trial judge found that a prima facie case had been made out. The respondent was called upon to enter her defence.

**[4]** Having heard the defence, the learned trial judge found that the prosecution had only succeeded in proving a case for possession under s 39A(2) of the Act. The respondent was convicted and sentenced to 18 years imprisonment with effect from the date of the arrest. Aggrieved, the prosecution appealed to this court. For the reasons that follow, we had unanimously allowed the appeal.

## THE PROSECUTION'S CASE

**[5]** On 8 November 2013, upon information received of a drug trafficking activities, Supp Mit a/l Emong ('SP8') and his team which comprised of, among others, Insp Nor Badrol Hisham bin Md Nor ('SP7'), S/Insp Ghazali and Insp Murni, went to Sultan Ismail Petra Airport at about 9am and waited for the arrival of flight MH 1388 from Kuala Lumpur.

**[6]** Upon arrival of the flight at about 12.15pm, SP8 instructed S/Insp Ghazali and Insp Murni to go to the luggage collection area and to detain the suspect (identified as the respondent). The respondent picked up a bag (exh P6).

**[7]** Thereafter, from the arrival hall, the respondent was escorted to the scanning machine at the departure hall. Upon being scanned, the bag, P6, revealed something suspicious. SP8 directed the respondent to be brought to the 'Pondok Polis' at the airport for the bag to be physically examined.

**[8]** At the 'Pondok Polis', the respondent was instructed to open the bag which was padlocked. The respondent took out a key (exh P8C(2)) to the padlock (exh P8C(1)) from her handbag. When the bag was opened, SP8 found saree clothing. Underneath the clothing, SP8 found lace material folded in a hard paper which was tied up with a rubber band. There were ten folds with each fold having five pieces of lace. Another fold had four pieces of lace. Altogether there were 54 pieces of lace (exhs P16AE–P26AE) found in the bag, P6.

**[9]** SP8 took one lace, opened it and cut the hard paper. When the hard paper was cut, SP8 found a brown packet containing white substance,

suspected to be dangerous drugs. The respondent and the exhibits were handed to the investigating officer, Insp Mazida bt Mohd Desa ('SP9') who later sent the lace and the plastic packets (P16G(1–5)–P26G(1–5) containing the substance to the Chemistry Department, in a box marked M1.

**[10]** The box M1 with 54 pieces of lace, 54 pieces of hard paper and 54 plastic packets were received by the chemist, Mohd Zawawi bin Yusoff ('SP2'). Upon analysis, SP2 confirmed that the substance found in the plastic packets was 3,128.80g of methamphetamine. Methamphetamine is listed in the First Schedule to the Act.

**[11]** The learned trial judge found that the subject matter of the charge, namely methamphetamine had been proven through the evidence of SP2. From the key and the luggage tag to P6 and from the boarding passes which show that the respondent was travelling from New Delhi and transited in Kuala Lumpur before her arrival in Kota Bharu, the learned trial judge found that the respondent had custody and control of the bag, P6 and had knowledge of the drugs inside the bag. The learned trial judge invoked the presumption of trafficking under s 37(da) of the Act (appeal record Vol 1, p 79) to find that the prosecution had made out a prima facie case against the respondent. The respondent was thus called upon to enter her defence.

THE DEFENCE

**[12]** The respondent gave evidence under oath where she stated that she went to India from Kampuchea on 30 October 2013. The purpose of her travel was for holiday and business. In India, she stayed at her friend's house for eight days. After eight days, the respondent called her friend in Kampuchea for her Kampuchean friend to call her friend in India to buy ticket for the respondent to return. The respondent however wanted to stop in Malaysia, namely in Kota Bharu to do some business. In Kota Bharu, the respondent was supposed to meet a friend. The respondent had not met this friend before.

**[13]** Whilst the respondent admitted carrying the bag, P6, when she was detained by the police, she denied having any knowledge of the drugs concealed in the lace. Her evidence was that the lace was given by her friends in India as a sample to be sold. It was her friend in Vietnam, called Say that had requested her to bring back goods from India for sale in Vietnam.

**[14]** The learned trial judge evaluated the evidence of the respondent as against her cautioned statement (exh D1) where His Lordship noted several inconsistencies between her oral testimony and exh D1.

**[15]** Nonetheless, at the conclusion of the trial, the learned trial judge found that the respondent had rebutted the presumption of trafficking under s 37(da) of the Act. Essentially, the finding was premised on the conduct of the respondent in remaining calm at all material time from the point she collected the bag until the time the bag was scanned and physically examined. The learned trial judge accepted the evidence of the respondent that she had no knowledge of the drugs and that she only knew about it when SP8 showed her the drugs concealed in the lace.

**[16]** The learned trial judge ruled that the prosecution had only succeeded in proving a case for possession of the drugs under s 12(2), punishable under s 39A(2) of the Act. The respondent was accordingly convicted and sentenced to 18 years imprisonment under s 39A(2) of the Act, hence the appeal.

THE APPEAL

**[17]** Learned DPP canvassed the following grounds of appeal:

(a) whether the respondent's conduct showed that she had no knowledge of the drugs;

(b) whether there were contradictions in the defence case; and

(c) whether the respondent had rebutted the presumption of trafficking under s 37(da) of the Act.

**[18]** In respect of the first ground, learned DPP cited *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 and *Francis Abuchi Odike v Public Prosecutor* [2015] MLJU 816; [2015] 1 LNS 928 to support his submission that the learned trial judge erred in relying on the conduct of the respondent to find that the respondent had no knowledge of the drugs.

**[19]** As regards the second ground, learned DPP submitted that the evidence of the respondent was not credible in view of the inconsistencies between her cautioned statement, exh D1 and her oral testimony. Learned DPP further submitted that the learned trial judge erred in failing to sufficiently evaluate the defence case as against the prosecution's case and in failing to sufficiently consider the discrepancies in the respondent's version.

**[20]** As for the third ground, it was the contention of learned DPP that the respondent's version was not probable and that the respondent failed to take steps to inspect the bag. The respondent was thus guilty of wilful blindness and had failed to rebut the presumption of trafficking under s 37(da) of the Act.

OUR DECISION

**[21]** The three grounds canvassed by learned DPP concerned the issue whether the learned trial judge was correct in his finding that the defence had rebutted the presumption of trafficking under s 37(da) of the Act and that the prosecution had failed to prove its case beyond reasonable doubt on the original charge of trafficking.

**[22]** In concluding at the end of the defence case that the respondent had no knowledge of the drugs, the learned trial judge stated (appeal record Vol 1, pp 28–29):

> [56] Di dalam kes ini, tindak tanduk atau kelakuan tertuduh semasa dihampiri oleh dua polis sejurus sahaja mengangkat beg P6 adalah tenang dan tidak cemas dan semasa diiringi keluar dan ditambah dengan polis yang lain seperti SP7 dan SP8 dan membawa tertuduh ke mesin imbasan x-ray sehingga masuk ke Pondok Polis di bangunan LTSIP juga tidak cemas. Keterangan ini disokong sendiri oleh SP7 dan SP8.
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> [57] Menurut tertuduh beliau mulai tahu ianya adalah barang salah apabila melihat pertama kalinya ada bahan Kristal putih di sebalik ikatan renda-renda tersebut. Ini disokong oleh keterangan SP8 sendiri yang mengakui tertuduh mulai cemas hanya selepas ditunjukkan kandungan bahan Kristal jernih di dalam balutan renda tersebut.
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> [58] Di dalam pembelaannya beliau melihat sendiri kandungan di dalam beg P6 tersebut semasa ditunjukkan oleh lelaki India di New Delhi tetapi beliau tidak terfikir dadah di dalam renda itu. Mahkamah ini memutuskan lelaki di New Delhi yang memberi beg P6 adalah sebenarnya pengedar.
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> [59] Mahkamah ini berkeputusan fakta kes ini berbeza dari keterangan kes yang lain-lain oleh sebab saksi SP7 dan SP8 sendiri mengakui bagaimana tertuduh kelihatan biasa sahaja walaupun telah memperkenalkan diri sebagai polis kepada tertuduh. Oleh kerana anggapan di bawah Seksyen 37(da) Akta, mengedar adalah satu anggapan yang boleh disangkal oleh itu, fakta yang ada di dalam kes ini yang paling sesuai dapat menolak anggapan ini.
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> [60] Dengan ini Mahkamah memutuskan pihak tertuduh berjaya menangkis anggapan di bawah s 37(da)(xvi) mengedar methamphetamine namun kesalahan memiliki masih berjaya dibukti atas kawalan ke atas beg P6 tersebut. Dengan itu Mahkamah ini telah memutuskan pihak pendakwaan berjaya membuktikan kesnya tanpa sebarang keraguan munasabah hanya setakat memiliki dadah di bawah Seksyen 12(2) dan hukuman di bawah S 39A(2) Akta yang sama.

**[23]** It has been emphasised by the Federal Court in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 that evidence of conduct is equivocal and is capable of more than one interpretation. Thus, conduct must not be considered in isolation but together with other evidence and circumstances of the case. The same principle was declared by this court in *Gunalan Ramachandran*:

> ... there is no shortage of cases on possession and knowledge in drug trafficking cases either by this or the highest courts in this country. The law is well established and requires no repetition. Knowledge is to be inferred from the facts and the surrounding circumstances of a case.

**[24]** Based on the above authorities, we found that the learned trial judge erred in relying on the respondent's calm conduct as conduct alone cannot be the basis to find absence of knowledge. His Lordship ought to have considered the whole facts and circumstances of the case which he failed to do, in particular the learned trial judge failed to consider that the respondent had not been consistent in her version.

**[25]** In her evidence, the respondent testified that she went to India for a holiday and for business purpose. She had many friends in India who gave her presents. The bag, exh P6 was also a present from her friend in India. The respondent further testified that she had seen the lace in the bag and that the lace was also given by her friends as a sample to be sold in Vietnam. In her cautioned statement, exh D1, the respondent however said the bag (which contained the saree and the lace) was given by an Indian man to be given to someone in Malaysia. There was no mention about her friends giving her presents in the cautioned statement.

**[26]** The respondent's evidence of going to India for a holiday and to do business in India and Malaysia was also contradicted by her cautioned statement. In exh D1, the respondent stated that she was offered by her Vietnamese friend called Say to deliver goods to Malaysia. The respondent was promised by Say that she will be paid USD800 before she left and the balance of USD800 will be paid after she completed delivery of the goods. The respondent had known Say for four years and Say had introduced the respondent to Hoa. Hoa was responsible for making the arrangement for the delivery of the goods and payment to the respondent. The respondent knew Hoa for about two months.

**[27]** On her accommodation in India, the respondent testified that she stayed at her friend's house for eight days. In her cautioned statement however, she stated the following:

(a) she stayed in Anoop Hotel for three days;

(b) on the third day, she received SMS from an unknown number asking her to check into another hotel;

(c) she took a taxi to the address given in the SMS;

(d) the address did not lead her to a hotel but to a vacant house;

(e) at the vacant house, she met an Indian man; and

(f) she stayed alone in the vacant house until the Indian man came on 7 November 2013 and gave her the flight ticket to Malaysia as well as the bag, P6.

**[28]** Further, it was the evidence of the respondent that she called her friend in Kampuchea for her to call her friend in India to buy the respondent's flight ticket to Malaysia. Whereas in her cautioned statement, the respondent stated that her flight ticket to Malaysia was given by the Indian man.

**[29]** We agreed with learned DPP that the learned trial judge failed to sufficiently evaluate the defence and failed to consider that the discrepancies or inconsistencies in the respondent's version affected the credibility of the defence. And we found that the learned judge erred in his conclusion that the respondent had rebutted the presumption of trafficking.

**[30]** The respondent's evidence on the events that led to her arrest, in our view, was inherently improbable for the following reasons:

(a) she stated that she went to India for a holiday but she mentioned nothing about the places that she visited as a tourist;

(b) she said she stayed in a friend's house in India for eight days yet she did not know the friend's name;

(c) if she had been staying with a friend in India, there was no need for the respondent to call her friend in Kampuchea and asked her Kampuchean friend to call her friend in India to buy the respondent's return ticket;

(d) 54 pieces of lace was too large an amount to serve as a sample; and

(e) the respondent's visit to Malaysia was purportedly to meet a friend, yet again the friend's name was not known to her.

**[31]** In our judgment, the reasonable inference to be drawn from the facts and circumstances of this case was that the respondent knew of the drugs concealed in the lace and that she was paid to carry the drugs from India to Malaysia, which was the very purpose of her travel to these two countries.

CONCLUSION

**[32]** Looking at the evidence in totality, we found that the prosecution had proved its case beyond reasonable doubt. The appeal was therefore allowed. The order of the High Court was set aside and substituted with an order of conviction under s 39B(1)(a) of the Act. The respondent was sentenced to death under s 39B(2) of the same Act.

*Appeal allowed; order of the High Court set aside and substituted with order of conviction under s 39B(1)(a) of the Act; respondent sentenced to death under s 39B(2) of the same Act.*

Reported by Dzulqarnain Ab Fatar